United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7423

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

No. 76-7423

GWENDOLYN SHELTON, on her own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant

- against -

J. HENRY SMITH, et al.,

Defendants-Appellees.

REPLY BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

Plaintiff-Appellant GWENDOLYN SHELTON submits this brief in reply to the brief of the Defendants-Appellees.

POINT I.

APPELLANT IS ENTITLED TO A HEARING PRIOR TO TERMINATION OF HER VISITING RIGHTS BECAUSE SHE DISPUTES THE FACTS ON WHICH THE DECISION TO TERMINATE WAS BASED

The defendants-appellees' brief consists primarily of a long recital of the alleged facts on which they based their decision to terminate appellant's right to visit her children in foster care. No detail is spared in the effort to portray the appellant as a monstrous mother, who lives in sordid surroundings, and is unworthy of visiting her children. Indeed, the appellees' allegations of facts even describe what the appellant must have "felt".*

Appellant, not surprisingly, disputes these factual allegations and the conclusions drawn from them. But she has never had an opportunity to present her side of the story on this issue, to present witnesses, to cross-examine the caseworkers or other witnesses who provided the information on which the decision to terminate was based, or to have a decision on visitation made by an impartial decision maker. This is what the instant case is about. The entire point of this

*For example: "She seemed to see all of her children as burdens. . . . Mrs. Shelton particularly felt this way about Alex." (Appellees brief p. 12-13).

lawsuit is that appellant should have notice and an opportunity for a hearing on these disputed issues, prior to losing the right to visit her children. Appellant is not asking this Court to decide what the outcome of the hearing should be; she is asking only that the prior hearing be held.

POINT I.

A SINGLE JUDGE MAY NOT PROPERLY ABSTAIN IN A MATTER OTHERWISE REQUIRED TO BE HEARD BY A THREE-JUDGE COURT

The appellees argue that a single District Court judge may properly abstain, even if the case is otherwise proper for convening a three-judge court. They argue (1) there is no authority for the position that a single judge may not abstain, (2) a single judge may dismiss for lack of standing, (3) a single judge may decline to convene a three-judge court. As will be discussed, the latter two points are correct, but irrelevant to the question of abstention; the first point is incorrect.

While appellees argue a single judge may abstain in a case otherwise requiring a three-judge court, they cite no authority for this proposition.* In fact all the authority is the contrary. See, e.g. New York State Waterways Association, Inc. v. Diamond, 469 F.2d 419, 423 (2d Cir.,

*The Court below cited Reilly v. Doyle, 483 F.2d 123, 127 (2d Cir., 1973) as authority permitting a single judge to abstain. The inapplicability of this case is discussed in appellant's main brief, pp. 8-9. Further, although Reilly affirmed the single judge's dismissal of the complaint, the decision does not discuss the procedures followed. Thus, the case may be an example where the Court "in the interest of conserving judicial resources, affirmed the district court's denial of a motion to convene such court rather than remand the case for a useless and expensive ritual," Abele v. Markle, 452 F.2d 1121, 1126 (2d Cir., 1971).

1972) ("the decision to abstain is for the three-judge court, not for the single judge") and other cases cited in appellant's main brief, p. 8.

The appellees also argue that a single judge may dismiss if the plaintiff lacks standing. This is correct, but is not what the Court did in this case. The Court suggested appellant might lose her standing in the future if her custodial rights were permanently terminated in family court proceedings, but the Court did not (and obviously could not) find that the plaintiff currently lacks standing: it cannot be seriously disputed that she has been deprived of the right to visit her children and that she is now aggrieved by this deprivation. Surely she is suffering actual injury, as distinguished from a remote, general, or hypothetical possibility of harm. United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947).

Finally, the appellees argue that a single judge may decline to convene a three-judge court if the constitutional issues raised are insubstantial. The Court below did not explicitly pass on the substantiality of appellant's constitutional claims. But if the decision below is read as a sub silentio ruling that a three-judge court is unnecessary, such ruling is erroneous.

Appellees argue that there is no parental "right" of visitation since the challenged statute bestows on the foster

care agency all "rights and obligations attendant to a child's custody while that child is in foster care." (Appellee's brief, p. 23). In the absence of a statutory "right" to visit, appellees argue, there is no constitutional deprivation resulting from the termination of visitation.* But appellant's asserted right to visit is primarily a constitutional right, which derives from the constitutionally protected right of parents to a relationship with their children, Stanley v. Illinois, 405 U.S. 645 (1972), and also from the communication and associational guarantees of the First Amendment, Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 18 n. 5 (S.D. Iowa, 1975). Also, in the case of one of the two children in foster care, there is a contractual and statutory right to visit, since the standard form agreement placing Alexander provides appellant the right to visit; under New York Social Services Law § 384-a the agency must comply with this term of the agreement.

Furthermore, appellant's procedural due process claims do not depend on whether parental visiting is a right or merely a privilege; the "rights" vs. "privileges" distinction has long been discredited. See, e.g. Shapiro v. Thompson, 394

*The appellees' argument that the challenged statute bestows on them the right to terminate parental visiting undercuts their argument elsewhere that the statute is vague in that it says nothing about visiting.

U.S. 618, 627 n. 6 (1969) (public welfare benefits), Green v. McElroy, 360 U.S. 474 (1959) (security clearance), Escalera v. New York City Housing Authority, 425 F.2d 853, 861 (2d Cir. 1970) (public housing tenancy), Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir., 1969) (liquor license). See generally Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 HARV. L. REV. 1439, 1451-54 (1968).

Thus, whether visiting is a right, or merely a privilege, it cannot be terminated without a prior hearing. As discussed in appellant's main brief visitation with one's children is certainly as important an interest as others (such as tenancy in public housing) the Courts have protected from termination without a prior hearing. There is no dispute that no hearing of any kind is provided parents of children in foster care prior to termination of visiting; the constitutional issues raised by this are not frivolous, and a three-judge court is required.

(1971) where the challenged state statute also did "not contain any provision whatsoever for notice and hearing." Id. at 439. Where the statute does not say anything about a hearing but there are "no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances", Id., there is no ambiguity. Nor is abstention proper on the possibility that a state court may also find the statute unconstitutional, Procunier v. Martinez, 416 U.S. 396, 400-401 (1974), McRedmond v. Wilson, 533 F.2d 757 (2d Cir., 1976).

Defendants-appellees also argue that state court remedies exist, which appellant has failed to use, and this justifies abstention. The only remedy the appellees specify is a motion for visiting which they argue appellant could now make in the pending Family Court proceedings to terminate her parental rights. There are a number of reasons why this is not a remedy for the wrongs appellant asserts. First, the Family Court proceedings are not directed to the issue of whether parental visiting should be permitted, and a motion for an interlocutory order to permit visiting pending resolution of the permanent neglect and abandonment proceedings is nowhere suggested or sanctioned by the Family Court Act. But even if such motion were appropriate, it could not provide appellant the relief she seeks in this proceeding, namely, an opportunity for notice and a hearing before visiting is

terminated.

Permanent neglect and abandonment proceedings are commenced by the foster care agencies, not the parents, and may never occur or may occur (as here) long after visiting has been terminated. These proceedings are not a prior hearing on the issue of terminating visiting rights. The pleadings do not state the reasons for terminating visiting rights, as this is not at issue (the pleadings Appellant received are appended to the brief as illustration). Thus, even if the appellant could now get a hearing in Family Court, she would still not have the relief she seeks for herself and her class; that is, specific notice of the grounds for terminating visiting and a hearing prior to the termination. Further, it is fundamental that exhaustion of state remedies is not required in a civil rights case such as this, McNeese v. Board of Education, 373 U.S. 668 (1963), Monroe v. Pape, 365 U.S. 167 (1961). For these reasons, abstention was not appropriate in this case, and the decision below must be reversed.

POINT IV.

IT WAS ERROR TO DENY APPELLANT AN INJUNCTION

Appellant also appeals from the denial of preliminary relief permitting her to visit her children pending a due process hearing on the proposed termination of visiting rights. Such appeal is properly taken to this Court, Hicks v. Pleasure House, 404 U.S. 1 (1971), Associated Theaters Inc. v. Wade, 487 F.2d 1221, 1222 (5th Cir., 1973). See also Weiss v. Duberstein, 445 F.2d 1297, 1299 (2d Cir., 1971).

The defendants-appellees claim that appellant has not been injured by the denial of visiting rights, and suggest that their factual allegations show that the best interests of the children are served by not allowing them to visit their mother. Even if the appellee's factual allegations are entirely true, there is nothing in them to show how the children could be harmed by a visit under agency supervision. The agency argues, and the Court below accepted, that in the event custody is eventually terminated, it would be better for the children not to see their mother in the interim. Aside from the question of whether there is any validity to this conclusion about child psychology in general,* the fact is that pa-

*See Appellant's main brief pp. 28-29 for a discussion of the conflicting views of child psychologists and others on this issue.

rental rights have not been terminated. Thus the Court below denied injunctive relief on the basis of a speculative future event and an equally speculative psychological result.*

In contrast, the appellant is being harmed now. There is no way that visits missed now can ever be restored, or the emotional deprivation rectified in the future. In the face of such clear, immediate and irreparable hardship, and probability of success, the Court should reverse the denial of preliminary injunctive relief, Dino de Laurentiis Cinematografica S.p.A. v. D-150, Inc., 366 F.2d 373 (2d Cir., 1966).

*No hearing was held below. The views of the children, now represented by counsel, were not obtained.

CONCLUSION

For the above reason, and the reasons in appellant's main brief, the decision of the Court below should be REVERSED.

Respectfully submitted,

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Dated: October 21, 1976
Brooklyn, New York

POINT III.

THIS IS NOT AN APPROPRIATE CASE FOR ABSTENTION

The defendants-appellees argue that abstention is proper in this case because (1) the challenged statute, New York Social Services Law § 383 (2), is vague since it says nothing about visiting, and (2) the challenged statute could be interpreted to require a prior hearing.

It is true that the statute says nothing about visiting, but defendants concede that the challenged statute's grant of custody empowers them to make determinations about parental visiting (Brief p. 24), and defendants-appellees apparently do not seriously argue that the term "custody" could be interpreted by a state court to exclude in every case a custodian's privilege to determine whom a child visits. State courts of course may overrule the custodian in particular cases, and direct that visiting be permitted, but there is no uncertainty about the meaning of the word "custody" in this regard: custody means control, at least over questions such as whom a child visits.

It is also true that the statute says nothing about a prior hearing. The statute neither provides for hearings, nor forbids them. But this does not require abstention, as the Court held in Wisconsin v. Constantineau, 400 U.S. 433

ADDENDUM

FAMILY COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter of	:	
JAMES ADAMS	:	PETITION
A Child Under the Age of 18 Years Alleged to be Abandoned.	:	Docket No.

T O T H E F A M I L Y C O U R T :

The undersigned Petitioner, SPENCE-CHAPIN SERVICES TO FAMILIES AND CHILDREN ("Spence-Chapin"), respectfully alleges that:

1. Petitioner is an authorized agency having its office and place of business at 6 East 94th Street, in the County and State of New York.

2. James Adams is a male child under the age of 18 years, born on June 17, 1973.

3. Said child has been in the care of the Commissioner of Social Services of the City of New York since August 17, 1973, and was placed with Spence-Chapin by the Commissioner on that date, upon the Respondent's statement that "she did not want or love him" and would stop feeding him if he was not placed.

4. The Respondent, Gwendolyn Shelton, is James' mother. The Respondent's address is 1865 Andrews Avenue, Bronx, New York. James' father's identity is unknown.

ADDENDUM

5. Despite repeated requests and suggestions from Petitioner, the Respondent has not visited or otherwise contacted James during his placement, except for a three-month period between March and May, 1974, wherein there where joint visits with both James and Alexander Jewett (another child in care, who is James' half-brother), which focused on Alexander's return. Since that time, the Respondent only once requested a visit with James prior to being advised that the present Petition was being instituted. That visit could not be arranged as requested because James then had the measles. Thereafter, the Respondent remained out of contact with the Petitioner for several months. The Respondent never has made payment for or contributed to James' food, clothing or shelter.

6. The Petitioner therefore seeks a judicial finding that James Adams is an abandoned child so that he may be adopted with the consent of the petitioner without further notice to the Respondent.

WHEREFORE, your Petitioner prays that an Order be made adjudicating James Adams to be an abandoned child and awarding the custody of said child to your Petitioner, and for such other and further relief as in the interests of said child may be granted.

Dated: New York, New York
July 9, 1976

SPENCE-CHAPIN SERVICES TO FAMILIES AND CHILDREN

By Loyce W. Bynum
Loyce W. Bynum
Associate Executive Director

ADDENDUM

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LOYCE W. BYNUM, being duly sworn, deposes and says:

I am the Associate Executive Director of Spence-Chapin Services to Families and Children, the Petitioner above-named, a domestic corporation; I have read the foregoing Petition and know the contents thereof; that said Petition is true of my own knowledge, except as to matters therein stated to be upon information and belief, and as to those matters, I believe them to be true.

Loyce W. Bynum

Sworn to before me this
9th day of July, 1976.

A Lindsay Neagle
Notary Public

A. LINDSAY NEAGLE
Notary Public, State of New York
No. 4612556 Qual. in West. Co.
Certificate Filed in New York County
Commission Expires March 30, 1977

ADDENDUM

FAMILY COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter of		
ALEXANDER JEWETT		
A Child Under the Age of 18 Years Alleged to be Permanently Neglected.		PETITION
		Docket No.

TO THE FAMILY COURT:

The undersigned Petitioner, SPENCE-CHAPIN SERVICES TO FAMILIES AND CHILDREN ("Spence-Chapin"), respectfully alleges that:

1. Petitioner is an authorized agency having its office and place of business at 6 East 94th Street, in the County and State of New York.

2. Alexander Jewett is a male child under the age of 18 years, born on January 12, 1970.

3. Said child most recently has been in the care of the Commissioner of Social Services of the City of New York since June 3, 1975, and was placed with Spence-Chapin by the Commissioner for foster care on that date. Alexander previously was in the care of the Commissioner, in the same Spence-Chapin foster home, from April 16, 1973 through June 7, 1974.

4. The Respondent, Gwendolyn Shelton, is Alexander's mother. Her address is: 1865 Andrews Avenue, Bronx, New York. The identity of Alexander's father is unknown.

ADDENDUM

5. Throughout the period of this placement, the Petitioner made diligent efforts to work with the Respondent to help her resolve the problems in her life preventing her from providing adequate care for Alexander, and to encourage and assist her in developing a parental relationship with Alexander, until it became clear that further such efforts were contrary to Alexander's moral and temporal welfare in that continued visitation would result in psychological harm to Alexander under the circumstances.

6. Despite this assistance, throughout this period, the Respondent has not made a substantial, continuous or repeated effort to remedy these problems or plan for Alexander's future, has visited him only infrequently. Although she has not done so, upon information and belief, the Respondent has been physically and financially able to visit Alexander regularly and plan for his future.

7. Further efforts to encourage and develop a parental relationship between the Respondent and Alexander would be detrimental to Alexander's moral and temporal welfare. Upon information and belief, it is unlikely that the Respondent could establish and continuously maintain an environment where Alexander could develop in an adequate manner.

8. The Petitioner seeks a judicial finding that Alexander Jewett is a permanently neglected child so that said child may be adopted with the consent of the petitioner without further notice to

ADDENDUM

the Respondent.

WHEREFORE, your Petitioner prays that an Order be made adjudicating Alexander Jewett to be a permanently neglected child and awarding the custody of said child to your Petitioner, and for such other and further relief as in the interests of said child may be granted.

Dated: New York, New York
July 9, 1976

SPENCE-CHAPIN SERVICES TO FAMILIES AND CHILDREN

By Loyce W. Bynum
Loyce W. Bynum
Associate Executive Director

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

ADDIE COLLINS, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 2007 Surf Avenue, Brooklyn, New York.

That on the 21st day of October, 1976, deponent served the within REPLY BRIEF FOR APPELLANTS upon the attorneys for Appellees each listed below, being the address designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York, addressed to:

SIMPSON, THACHER & BARTLETT, ESQS.
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Affidavit of Service By Mail (Cont'd)

W. BERNARD RICHLAND, ESQ.
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New York, New York 10007
Attn: GAYLE REDFORD

Addie Collins
ADDIE COLLINS

Sworn to before me this

21st day of October, 1976

Toby Golick
NOTARY PUBLIC

TOBY GOLICK
NOTARY PUBLIC, State of New York
No. 31-6583750 - New York County
Commission Expires March 30, 19[illegible]